

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**BUDIMIR DAMNJANOVIC, and
DESANKA DAMNJANOVIC,**

Civil Action No. _____

Plaintiffs,

Hon. _____

vs.

**UNITED STATES DEPARTMENT OF THE AIR FORCE,
SECRETARY DEBORAH LEE JAMES, in her official capacity as Secretary of the Air
Force,
UNITED STATES DEPARTMENT OF DEFENSE,
SECRETARY CHARLES T. HAGEL, in his official capacity as Secretary of the U.S.
Department of Defense, and**

UNITED STATES OF AMERICA.

jointly and severally,
Defendants.

EPIC Law PLLC Hattem A. Beydoun (P66071) Office: Ste 606, 400 Monroe, Detroit MI 48226 Mail: Po Box 32598, Detroit MI 48232 Tel: (888) 715-8033 Fax: (313) 254-4923 Email: hbeydoun@epiclg.com Attorney for Plaintiffs	
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COMPLAINT AND JURY DEMAND

1. Plaintiff's Budimir Damjanovic, and Desanka Damjanovic ("Plaintiffs") are inventors of the subject matter of U.S. Patent Application Serial Number 11/881,492 (the "Invention" or the "492 Application").

2. The Commissioner of Patents of the United States Patent & Trademark Office ("USPTO"), as requested and notified by the Defendant Department of the Air Force, ordered that the Invention be kept secret and withheld the publication of the application or the grant of a patent pursuant to 35 U.S.C. § 181 by issuance of two secrecy orders issued January 22, 2009

and November 21, 2013 (“Secrecy Order”).

3. Plaintiffs seek just compensation under 35 U.S.C. § 183 for the damages and/or use of their invention by and from the Defendants Department Of The Air Force, Secretary Deborah Lee James (in her official capacity as Secretary of the Air Force), Department Of Defense, Secretary Charles T. Hagel (in his official capacity as Secretary of Defense), and the United States Of America (hereinafter collectively referred to as “Defendants” or “Government”). Plaintiffs seek restitution for any benefits received by the Defendants by imposition of the Secrecy Order declaring the Invention secret resulting in an inequity to Plaintiffs under unjust enrichment (Michigan common law). Plaintiffs also seek an order requiring Defendants to enact rules and regulations enabling the Defendants to carry out the requirements of 35 U.S.C. § 183 thereby allowing patent applicants under a secrecy order the ability to determine just compensation arising from damages to applicants.

4. In the alternative, this lawsuit challenges the Constitutionality of The Invention Secrecy Act of 1951 (Pub.L. 82–256, 66 Stat. 3, enacted February 1, 1952, codified at 35 U.S.C. §§ 181–188) (“Patent Secrecy Act”). Plaintiff seeks declarative relief that the secrecy provisions of the Patent Act are contrary to the provisions of the Constitution and are therefore unconstitutional.

PARTIES

5. Plaintiffs are citizens of the United States of America residing in Wayne County, Michigan.

6. Defendant United States Department of the Air Force (“Air Force”) is a military department within the Department of Defense of Defendant United States of America. The United States formed the Department of the Air Force on September 18, 1947, per the National

Security Act of 1947 and includes all elements and units of the United States Air Force.

7. Defendant Secretary Deborah Lee James is the Secretary of the Air Force. Secretary James has ultimate authority over the Air Force and is responsible and authorized for overseeing claims under 35 USC § 183.

8. Defendant United States Department of Defense is an executive agency of the United States government responsible for the administration, enforcement, and policies of the regulations which are the subject of this lawsuit and oversees the Defendant U.S. Department of Air Force.

9. Defendant Charles T. Hagel is the Secretary of Defense. Secretary Hagel has ultimate authority over the Department of Defense, of which the Air Force is a component.

10. The United States of America is also a Defendant.

JURISDICTION AND VENUE

11. This action in which the United States is a defendant arises under the Constitution and laws of the United States. Jurisdiction is conferred on this Court pursuant to 35 U.S.C. § 183, 28 U.S.C. §§ 1331, 1346 and 1338. The Court also has jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 702. Plaintiffs have previously filed an administrative claim seeking just compensation, the Defendants having fully and unequivocally denied Plaintiffs' claim, Plaintiffs have exhausted their administrative remedies and have therefore acquired the right to file this action.

12. Plaintiffs' claims for declaratory relief are authorized by the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

13. Venue is proper under 35 U.S.C. § 183 and 28 U.S.C. § 1391(e) because Defendants reside in this district and a substantial part of the acts giving rise to Plaintiffs' claims

occurred in this district.

14. This Court has authority to award Plaintiffs their reasonable costs and attorneys' fees pursuant to 28 U.S.C. § 2412, 5 U.S.C. § 504, and the general legal and equitable powers of this Court.

BACKGROUND

15. Plaintiffs incorporate by reference all the above paragraphs as if fully set forth herein.

16. Plaintiffs filed the '492 Application with the USPTO on July 28, 2007.

17. The Commissioner of Patents issued a secrecy order directed to the '492 application on January 22, 2009 and a second secrecy order on November 21, 2013 pursuant to the directions of the Defendants.

18. Prior to the imposition of the Secrecy Order, Plaintiffs were planning on marketing and licensing their invention to third parties, possibly the Defendants, and seeking foreign patent rights.

19. The issuance of the Secrecy Order prevented Plaintiffs from marketing, advertising, selling or offering for sale, licensing, or even discussing the Invention with third parties.

20. Plaintiffs' ability to exploit and reap the rewards and benefits of their invention is premised on being able to disclose and market the Invention to potential customers and investors. However, due to the imposition of the Secrecy Order, Plaintiffs have been unable to disclose the details of his Invention to interested or third parties.

21. On November 21, 2011, the USPTO issued a Notice of Allowability on the '492 application, which indicated that although the claims of the application were now being allowed,

the application would still be withheld from issue during such period as the national interest required.

22. On or about June 20, 2012 and July 11, 2012, Plaintiffs properly and timely submitted an administrative claim to the Secretary of the Air Force and the Defendants for just compensation based on the imposition of the Secrecy Order issued on the '492 application, pursuant to 35 U.S.C. § 183.

23. From the time Plaintiffs submitted their administrative claim to the present, Plaintiffs have contacted, consistently provided information, and requested information from the Government in an attempt to resolve their claim.

24. The Government has not cooperated or assisted Plaintiffs in evaluating their Invention for purposes of determining just compensation under 35 U.S.C. § 183.

25. On March 20, 2014, the Government denied Plaintiffs claim for just compensation in its entirety.

26. Plaintiffs have exhausted their administrative remedies, and now seek relief in this Court.

COUNT I
JUST COMPENSATION PURSUANT TO 35 U.S.C. § 183

27. Plaintiffs incorporate by reference all the above paragraphs as if fully set forth herein.

28. By and through the Government's imposition of the Secrecy Order on the '492 application, Plaintiffs have suffered damages resulting from intrusion on their rights to their Invention; including but not limited to their right to sell or offer for sale the Invention, to market the Invention to the public and third parties, profits lost as a result of interference with business opportunities, and the loss of foreign filing rights.

29. By and through the Government's use of the Invention, the Government has not justly compensated Plaintiffs for the Government's use of the Invention.

30. If not for the imposition of the Secrecy Order by Defendants, the Invention can possibly and is likely to be used by third parties against and contrary to the interests of the Defendants.

31. The Defendants imposition of the Secrecy Order prevents the disclosure and/or the use of the Invention by third parties against and contrary to the interests of the Defendants.

32. Therefore, by keeping the Invention secret and unknown to third parties through imposition of the Secrecy Order, the Defendants have also used the Invention and/or benefited to the detriment of Plaintiffs.

33. Plaintiffs sought administrative remedies pursuant to 35 U.S.C. § 183 from the Defendants for the imposition of the Secrecy Order and/or use of the Invention once notification that the '492 application was in condition for allowance except for the Secrecy Order.

34. Upon presentation of the Plaintiffs' claim to the head of the Department of the Air Force for compensation for the damages resulting from the imposition of the Secrecy Order and/or use of the Invention, the Defendants refused to offer Plaintiffs any compensation.

35. As a result of the Government's imposition of the Secrecy Order, the Plaintiffs have sustained actual damages.

36. The Government has not offered or provided Plaintiffs with any compensation based on the withholding of the Invention and issuance of a patent through the imposition of the Secrecy Order as is statutorily required by 35 U.S.C. § 183 for purposes of just compensation.

37. The Government has not offered or made available to the Plaintiffs adequate means and/or information to determine damages and just compensation.

38. Plaintiffs and Defendants cannot reach an agreement as to just compensation for Defendants' imposition of the Secrecy Order and/or use of the Invention, and therefore seek relief from this Court on this issue.

COUNT II
UNJUST ENRICHMENT- 28 U.S.C. § 1346 & MICHIGAN COMMON LAW

39. Plaintiffs incorporate by reference all the above paragraphs as if fully set forth herein.

40. If not for the imposition of the Secrecy Order by Defendants, the Invention can possibly and is likely to be used by third parties against and contrary to the interests of the Defendants.

41. The Defendants imposition of the Secrecy Order prevents the disclosure and/or the use of the Invention by third parties against and contrary to the interests of the Defendants.

42. By keeping the Invention secret and unknown to third parties through imposition of the Secrecy Order, the Defendants have also used the Invention and/or received a benefited resulting in an inequity to Plaintiffs because of retention of the benefit by the Defendants.

43. The Plaintiffs have received a detriment and/or have been damaged because of Defendants retention of the Secrecy Order by, but not limited to, preventing Plaintiffs from marketing, selling, offering for sale, licensing, and/or applying for foreign patent rights for their invention.

44. Imposition of the Secrecy Order by the Defendants has unjustly enriched Defendants under Michigan common law to the detriment of Plaintiffs and Defendants are required to make restitution to the Plaintiffs for Defendants' gain.

COUNT III
IN THE ALTERNATIVE
DECLARATIVE RELIEF THAT 35 U.S.C. §§ 181-188 ARE UNCONSTITUTIONAL

45. Plaintiffs incorporate by reference all the above paragraphs as if fully set forth herein.

46. Plaintiffs hereby present its count in the alternative challenging the Constitutionality of The Invention Secrecy Act of 1951 (Pub.L. 82–256, 66 Stat. 3, enacted February 1, 1952, codified at 35 U.S.C. §§ 181–188).

47. The Secrecy Order prohibits the Inventors from disclosing the subject matter of the Invention. One who willfully violates the secrecy order will likely have his patent application held abandoned, lose his right to compensation, be barred from receiving a patent and may be subject to a substantial fine and up to two years in prison under 35 U.S.C. §§ 182, 184, 185, 186.

48. The First Amendment states “Congress shall make no law ... abridging the freedom of speech, or of the press”

49. Because the Patent Secrecy Act prohibits Plaintiffs from speaking of their Invention to third parties, including potential customers, it violates the First Amendment of the Constitution.

50. The Patent Secrecy Act allegedly provides a method of just compensation for the imposition of the Secrecy Order and/or the Government’s use of the Invention; however, the Patent Secrecy Act prohibits Plaintiffs from establishing damages and/or actual damages arising from the imposition of the Secrecy Order by prohibiting Plaintiffs from marketing, offering for sale, or otherwise disclosing the invention to third parties including possible customers, and/or taking advantage of foreign patent rights. Therefore, the Patent Secrecy Act does not provide a means for Plaintiffs to recover or establish just compensation and/or actual damages arising from the imposition of the Secrecy Order and/or the Government’s use of the Invention.

51. The Fifth Amendment states: “No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

52. Because the Patent Secrecy Act requires Plaintiff to show damages and/or actual damages while contemporaneously prohibiting Plaintiffs from otherwise disclosing the Invention, the Patent Secrecy Act has resulted in Plaintiffs being deprived of property without due process and just compensation in violation of the Fifth Amendment.

53. Moreover, because the Secrecy Order prohibits Plaintiffs from discussing the Invention with anyone not aware of the Invention prior to the imposition of the Secrecy Order and loss of foreign filing rights, the Secrecy Order has resulted in loss of commercial gain and loss of foreign filing rights which amount to an unconstitutional taking by the Government contrary to the Fifth Amendment.

COUNT IV
DECLARATIVE RELIEF ORDERING DEFENDANTS TO ISSUE RULES AND
REGULATIONS TO ENABLE THE DEFENDANTS TO CARRY OUT THE
PROVISIONS OF 35 U.S.C. § 183

54. Plaintiffs incorporate by reference all the above paragraphs as if fully set forth herein.

55. The Defendants are required to provide a means to allow patent applicants, like Plaintiffs, whose invention is subject to a secrecy order, the ability to apply to the head of Defendants for compensation for the damage caused by the order of secrecy and/or for the use of the invention by the Defendants, resulting from applicant’s disclosure for purposes of full settlement for the damage and/or use.

56. Pursuant to 35 U.S.C. § 188, the Defendants have not adopted or issued rules and regulations to enable the Defendants to carry out the provisions of 35 U.S.C. § 183 including but

not limited to determining just compensation arising from damages and/or actual damages to applicants.

57. Therefore, in order to assure that applicants are compensated and for purposes of carrying out the provisions of 35 U.S.C. § 183, Defendants should be ordered to enact rules and regulations enabling the Defendants to carry out the requirements of 35 U.S.C. § 183 and allowing applicants the ability to determine just compensation arising from damages to applicants and/or use of the invention by the Government.

RELIEF REQUESTED

WHEREFORE, Plaintiffs requests judgment in their favor, including a demand for judgment against Defendants for just compensation arising from the Defendants imposition of the Secrecy Order and/or for the use of the Invention by the Defendants, and such other and further relief, including costs and fees pursuant to 28 U.S.C. § 2412, as the Court deems proper. Plaintiffs further request restitution to the Plaintiffs for Defendants' gain arising from the imposition of Secrecy Order. Plaintiffs also request an order directing Defendants to enact rules and regulations enabling the Defendants to carry out the requirements of 35 U.S.C. § 183 thereby allowing applicants the ability to determine just compensation arising from damages to applicants and/or use by the Government. In the alternative, Plaintiffs request that the Court declare that The Invention Secrecy Act of 1951 (Pub.L. 82–256, 66 Stat. 3, enacted February 1, 1952, codified at 35 U.S.C. §§ 181–188) unconstitutional for violating the First and Fifth Amendments to the Constitution.

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury in this action on all issues so triable.

Respectfully submitted,

Dated: May 14, 2014

/s/Hattem Beydoun
EPIC Law PLLC
Hattem A. Beydoun (P66071)
Office: Ste 606, 400 Monroe, Detroit MI 48226
Mail: Po Box 32598, Detroit MI 48232
Tel: (888) 715-8033 Fax: (313) 254-4923
Email: hbeydoun@epiclg.com
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BUDIMIR DAMNJANOVIC et al.,

Plaintiffs,

Civil Case No. 14-11920
Honorable Linda V. Parker

v.

UNITED STATES DEPARTMENT
OF THE AIR FORCE et al.,

Defendants.

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS [ECF NO. 16]**

Plaintiffs Budimir Damnjanovic and Desanka Damnjanovic (“Plaintiffs”) seek compensation under the Invention Secrecy Act, 35 U.S.C. § 183, among other things, for damages allegedly resulting from two secrecy orders the Government imposed on their patent application. Thereafter, Defendants United States of America, United States Department of the Air Force, United States Department of Defense, Deborah Lee James, and Charles T. Hagel (collectively “Defendants” or “the Government”) filed their motion to dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6). As set forth below, the Court **GRANTS IN PART AND DENIES IN PART** Defendants’ motion.

I.

Factual Background

Plaintiffs purport that they are the inventors of the subject matter of U.S. Patent Application Serial Number 11/881,492 (the “‘492 Application”). (Compl., ECF No. 1 at Pg. ID 1.) Plaintiffs filed their patent application on July 28, 2007, with the United States Patent & Trademark Office (“Patent Office”). (*Id.*) On January 22, 2009, at the request of the Air Force, the Patent Office issued a secrecy order, pursuant to 35 U.S.C. § 181. (*Id.* at Pg. ID 4.) On November 21, 2013, the Patent Office issued a second secrecy order. (*Id.*) The secrecy orders prohibited and subjected Plaintiffs to penalties for unauthorized publication or disclosure of the subject matter of the ‘492 Application. (*Id.*)

On November 21, 2011, the Patent Office issued a Notice of Allowability, pertaining to the ‘492 Application – the issuance of which allowed Plaintiffs to file an administrative claim for compensation for any purported damage caused by the secrecy orders, and for any purported use of the invention by the Government resulting from Plaintiffs’ disclosure (*Id.*; Defs.’ Mot., ECF No. 16 at Pg. ID 73.) Thereafter, in June or July 2012, Plaintiffs timely submitted their administrative claim for compensation with the Air Force, pursuant to 35 U.S.C. § 183. (Compl., ECF No. 1 at Pg. ID 5.) The Air Force denied Plaintiffs’ administrative claim, determining that Plaintiffs were not entitled to any compensation. (*Id.*)

Plaintiffs, thereafter, exhausted their administrative remedies and filed the instant action. (*Id.*) In their complaint, Plaintiffs bring four claims against Defendants: (1) just compensation pursuant to 35 U.S.C. § 183; (2) unjust enrichment pursuant to 28 U.S.C. § 1346 and Michigan common law; (3) “declarative relief that 35 U.S.C. § § 181–188 are unconstitutional”; and (4) “declarative relief ordering Defendants to issue rules and regulations to enable the Defendants to carry out the provisions of 35 U.S.C. § 183.” (*Id.* at Pg. ID 5–10.) Subsequent to the filing of the complaint, Defendants filed their motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6). (ECF No. 16.)

II.

Standard of Review

Defendants bring their motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Rule 12(b)(1) allows dismissal for “lack of jurisdiction over the subject matter,” while Rule 12(b)(6) addresses the failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(1), (b)(6). “When a defendant moves for a motion to dismiss under both Rule 12(b)(1) and (b)(6), the court should consider the 12(b)(1) motion first because the 12(b)(6) motion is moot if subject matter jurisdiction does not exist.” *Taylor v. Dep’t of Human Servs. of Michigan*, No. 09-CV-14639, 2010 WL 1257347, at *1-2 (E.D.

Mich. Mar. 30, 2010) (quoting *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir.1990)).

Only a complaint that states a plausible claim for relief survives a Rule 12 (b)(6) motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Courts must construe the complaint in the light most favorable to the plaintiff and draw all reasonable inferences in the plaintiff's favor. *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 835 (6th Cir. 2012). Further, the complaint must plead factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678 (2009). A complaint does not “suffice if it tenders ‘naked assertions’ devoid of ‘further factual enhancement.’ ” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). To survive a motion to dismiss, a complaint need not contain “detailed factual allegations,” but it must contain more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action . . .” *Twombly*, 550 U.S. at 555.

III.

Just Compensation Claim

35 U.S.C. § 181 authorizes the Commissioner of Patents, upon the recommendation of a specified federal agency, to order that an invention be kept secret and to withhold the publication of an application or the grant of a patent if

publication or disclosure “might ... be detrimental to the national security.” 35 U.S.C. § 181. “To justify the imposition of a secrecy order, the Government itself need not have any interest in the invention.” *Linick v. United States*, 104 Fed. Cl. 319, 321 (2012) *aff’d*, 515 F. Appx. 892 (Fed. Cir. 2013) (citing *Hornback v. United States*, 36 Fed. Cl. 552, 554 (1996)). “The only requirement under § 181 is that the appropriate government agency determine that divulgence might harm national security.” *Id.* After the Commissioner orders an invention to be kept secret, § 186 of the Invention Secrecy Act makes it a criminal offense to disclose the invention, or material information about the invention, without authorization. *Id.*

The Invention Secrecy Act provides relief for a patent owner who has been affected by a secrecy order, granting the owner the right to seek just compensation “for the damage caused by the order of secrecy.” 35 U.S.C. § 183. “The *mere existence* of a secrecy order does not give rise to damages.” *Linick*, 104 Fed. Cl. at 321 (further citations omitted). “Instead, something more must be shown.” *Id.* To recover under § 183, it is not enough for a plaintiff to claim speculative damage; instead, recovery requires proof of either actual damage or concrete evidence of damages. *Id.* (citing *Constant v. United States*, 617 F.2d 239, 244 (Ct. Cl. 1980)) (further citations omitted).

Defendants assert that Plaintiffs have not stated a plausible claim for compensation under 35 U.S.C. § 1983 because: (1) Plaintiffs fail to allege any non-

speculative damages resulting from imposition of the secrecy order; and (2) Plaintiffs fail to allege any actual use of their purported invention by Defendants. (Defs.' Mot., ECF No. 16 at Pg. ID 77.)

“A motion to dismiss under Rule 12(b)(6) is disfavored and rarely granted.” *Nichols v. Berrong*, 141 F. Appx. 451, 453 (6th Cir. 2005) (citing *Harris v. Am. Postal Workers Union*, 198 F.3d 245 (6th Cir.1999) (further citations omitted). With this in mind, the Court finds that Plaintiffs have alleged sufficient facts, at least at this point in the litigation, to support their just compensation claim. In the complaint, Plaintiffs assert that they suffered injury as a result of the imposition of the secrecy orders – namely, Plaintiffs assert that they have suffered damages resulting from not being able to sell their invention, and no longer being able to market their invention. (Compl., ECF No. 1 at Pg. ID 5.) Additionally, Plaintiffs assert that the secrecy orders led to profit loss because they ruined Plaintiffs’ business opportunities and stripped Plaintiffs of their foreign filing rights. (*Id.*) Further, Plaintiffs assert that Defendants have used their invention without providing just compensation for their use. (*Id.* at Pg. ID 6.) The factual content provided is plausible and contains both direct and inferential allegations respecting all material elements of Plaintiffs’ just compensation claim, and allows the Court to draw a reasonable inference that Defendants are liable for the misconduct

alleged. Accordingly, the Court **DENIES** Defendants' motion as to Count 1 of the complaint.

IV.

Unjust Enrichment Claim

Plaintiffs maintain in their complaint that Defendants were unjustly enriched as a result of the imposition of the secrecy orders on the '492 application, because their invention would have been used by third parties, contrary to the interests of the United States, were the secrecy orders not in place. (*Id.* at Pg. ID 7.) Plaintiffs further contend that they suffered from imposition of the secrecy orders, while Defendants benefitted, because Plaintiffs were prevented from selling, licensing and further marketing their invention. (*Id.*) Defendants move to dismiss Plaintiffs' unjust enrichment claim, pursuant to Rule 12(b)(1), arguing that the United States has not waived its sovereign immunity with respect to claims for unjust enrichment. The Court agrees.

The United States, as a sovereign, cannot be sued without its prior consent, and the terms of its consent define the Court's subject matter jurisdiction. *Holy Love Ministry v. United States*, No. 1:13 CV 1830, 2014 WL 2434700, at *2 (N.D. Ohio May 29, 2014) *aff'd*, No. 14-3583, 2015 WL 4926286 (6th Cir. Aug. 19, 2015) (citing *McGinness v. U.S.*, 90 F.3d 143, 145 (6th Cir. 1996)). A waiver of

sovereign immunity must be strictly construed, unequivocally expressed, and cannot be implied. *Id.* (citing *U.S. v. King*, 395 U.S. 1, 4 (1969)).

“[I]t is well established that, in the absence of an explicit waiver, there is no general waiver of sovereign immunity by the United States for unjust enrichment claims. *Van Dyk Mortgage Corp. v. United States*, 503 F. Supp. 2d 876, 878 (W.D. Mich. 2007) (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Chem–Nuclear Sys., Inc. v. Arivec Chems., Inc.*, 978 F.Supp. 1105, 1110 (N.D. Ga. 1997)). Defendants correctly note that “no specific waiver of sovereign immunity exists to permit a suit against the government based on implied contractual theories such as unjust enrichment[.]” *Resolution Trust Corp. v. Kim*, No. CIV.A.94-CV-73768-DT, 1996 WL 426456, at *1 (E.D. Mich. Mar. 21, 1996). Accordingly, because Plaintiffs are unable to direct the Court to an explicit waiver of sovereign immunity as to unjust enrichment claims, the Court **GRANTS** Defendants’ motion as to Count 2 of the complaint.

V.

Purported Constitutional Violations of the Invention Secrecy Act

Plaintiffs request that the Court declare the Invention Secrecy Act “unconstitutional for violating the First and Fifth Amendments.” (Compl., ECF No. 1 at Pg. ID 7–9.)

A. First Amendment Violation

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), permits a court to enter declaratory relief only “[i]n a case of actual controversy....” 28 U.S.C. § 2201(a). Article III's case and controversy requirement is not satisfied, and a court therefore has no jurisdiction, when the claimant lacks standing – that is, a sufficiently concrete and redressable interest in the dispute. *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 961 (6th Cir. 2009) (citing *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008)). Accordingly, standing is the threshold question in every federal case. *Id.* (citing *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001)) (further citations and quotations omitted).

To satisfy the Constitution's standing requirement, a party must establish that: (1) he or she has suffered an “injury in fact” that is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* (citing *Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006)). Chiefly, “[i]n the context of a declaratory judgment action, allegations of past injury alone *are not sufficient* to confer standing. The plaintiff *must allege and/or demonstrate* actual present harm or a significant possibility of future harm.” *Ibid.* (emphasis added).

With respect to the purported First Amendment violation, Plaintiff contends that “[b]ecause the [Invention Secrecy Act] prohibits Plaintiffs from speaking of [their invention] to third parties, including potential customers, it violates the First Amendment of the Constitution.” (*Id.* at Pg. ID 8.) Defendants contend that the Court does not have jurisdiction over this request because the secrecy orders have been lifted, and thus the issue is moot. (Defs.’ Mot. ECF No. 16 at Pg. ID 92.)

Plaintiffs’ First Amendment argument fails because the harms they claim they suffered are past injuries. Further, the purported prohibition on speech Plaintiffs allegedly endured is not an ongoing issue, given that the secrecy orders have been lifted.

Plaintiffs assert that they are challenging the constitutionality of the Invention Secrecy Act – rather than the constitutionality of the secrecy orders – and that because the Invention Secrecy Act is “an active federal statute that *has caused* damages to Plaintiffs under the First Amendment,” declaratory relief is warranted. (*Id.*) This argument fails because, as previously stated, when seeking declaratory relief, allegations of past relief are insufficient to support standing. (Pls.’ Resp. Br., ECF No. 17 at Pg. ID 142.) Accordingly, Plaintiff’s First Amendment argument fails.

B. Fifth Amendment Violation

Plaintiffs assert that the Invention Secrecy Act requires Plaintiffs to show damages, yet also prohibits Plaintiffs from disclosing the invention, thereby constituting a taking , depriving them “of property without due process and just compensation in violation of the Fifth Amendment.” (Compl., ECF No. 1 at Pg. ID 9.) Further, Plaintiffs assert that they have lost foreign filing rights, and have also suffered commercial gain as a result of the imposition of the secrecy order, thereby “amount[ing] to an unconstitutional taking by the Government contrary to the Fifth Amendment.” (*Id.*)

Defendants contend that Plaintiffs have failed to state a plausible takings claim against them since Plaintiffs are precluded from asserting a Fifth Amendment takings claim “because the Invention Secrecy Act provides the exclusive remedy for obtaining compensation for any taking of private property that occurred during the pendency of [the] secrecy order[s].” (Defs.’ Mot., ECF No. 16 at Pg. ID 87.) The Court agrees.

Concerning damages resulting from imposition of the secrecy orders, “a Fifth Amendment takings argument is inappropriate, because 35 U.S.C. § 183 provides the *exclusive remedy* to inventor-owners for damages claimed as the result of a secrecy order imposed by the government.” *Hornback v. United States*, 16 F.3d 422 (Fed. Cir. 1993) (emphasis added); *See Hornback v. United States*, 62

Fed. Cl. 1, 3 (2004) *aff'd*, 405 F.3d 999 (Fed. Cir. 2005). Accordingly, Plaintiff's Fifth Amendment argument fails.

Since the bases for Plaintiffs' request that the Court declare the Invention Secrecy Act unconstitutional are unsubstantiated, the Court **GRANTS** Defendants' motion as to Count 3.

VI.

Request for Order Requiring Implementation of Rules and Regulations

Finally, Plaintiffs assert that pursuant to 35 U.S.C. § 188, Defendants should be required to adopt and issue rules and regulations enabling Defendants to carry out the provisions of 35 U.S.C. § 183, which allow for individuals to "apply to the head of any department or agency who caused the order to be issued, for compensation for the damage caused by the order of secrecy and/or for the use of the invention by the Government, resulting from [] disclosure." 35 U.S.C. § 183. (Compl., ECF No. 1 at Pg. ID 9–10.)

Plaintiffs fail to provide an adequate basis for the declaratory relief they seek. 35 U.S.C. § 183 provides the means for which a plaintiff may apply – to the head of a department or agency having caused the issuance of a secrecy order – to obtain compensation for damages caused by the secrecy order, and/or for the use of the invention by the Government resulting from disclosure. 35 U.S.C. § 183. While 35 U.S.C. § 188 provides that "[the government] *may separately issue* rules and

regulations to enable the respective department or agency to carry out the provisions of this chapter, and may delegate any power conferred by this chapter,” the use of the nonobligatory term “may” – rather than “shall” or “must” – in § 188, makes quite apparent that Defendants are not required to issue separate rules and regulations to carry out the provisions of 35 U.S.C. § 183. Instead, Defendants have the option to implement additional rules and regulations, beyond those provided for in § 183, should they so choose. The Court cannot order Defendants to issue rules and regulations they are not, under law, obligated to implement. Thus, because Plaintiffs fail to direct the Court to any statute, order, or command, compelling agency action in this context, declaratory relief is unwarranted. Accordingly, the Court **GRANTS** Defendants’ motion as to Count 4.

Accordingly, for the foregoing reasons, Defendants' motion to dismiss brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6) is **GRANTED IN PART AND DENIED IN PART** in that Counts 2, 3 and 4 are **DISMISSED WITH PREJUDICE**. Dismissal as to Count 1 of the complaint is **DENIED**.

SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: September 22, 2015

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, September 22, 2015, by electronic and/or U.S. First Class mail.

s/ Richard Loury
Case Manager